

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

JOHN F. KIRK
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101-4100
TELEPHONE (619) 533-5800
FAX (619) 533-5856

MEMORANDUM OF LAW

DATE: February 5, 2001
TO: George Loveland, Deputy City Manager
FROM: City Attorney
SUBJECT: Assembly Bill 2182 - Alternative Bidding Requirements

QUESTIONS PRESENTED

- 1) Does Assembly Bill 2182 apply to City of San Diego public works contracts?
- 2) What obligations are imposed by Assembly Bill 2182, which mandates specified procedures when alternative bidding is employed?

SHORT ANSWERS

- 1) Assembly Bill 2182 applies to those public works contracts which involve anything other than purely "municipal affairs." As a practical matter, it will apply any time county, state, or federal funds are used on a project, or when a project involves agencies other than the City.
- 2) Assembly Bill 2182 requires that when alternative bidding is used in a contract, the contracting entity specify in the bid documents which of four allowable methods, set forth in the statute, will be used in the computation of the lowest bid.

DISCUSSION

The practice of including additive or deductive alternatives (“alternates”) in a request for bids allows the City to request bidders to provide prices for various line items which may or may not ultimately be ordered, depending upon the availability of funds and the amount of the lowest bid. This practice allows the City a measure of flexibility in the scope of contracts, ensuring that the most benefit is realized from the limited funding available for a public works project.

Assembly Bill 2182 added section 20103.8 to the Public Contract Code, effective January 1, 2001.¹ Section 20103.8 mandates that particular procedures be employed when alternative bidding is employed in a public works contract. When such a contract includes alternative bidding, Section 20103.8 limits the methods which may be utilized to determine the low bidder, and mandates that the bid solicitation specify which method will be so used. The enactment of section 20103.8 raises two issues - whether the new requirements apply to the City, and if so, what steps are required to comply with the new law.

A. Applicability to City Contracts

Under Article 11 of the California Constitution the City is a charter city: The City's “municipal affairs” are controlled by the City Charter, rather than the enactments of the state legislature such as Public Contract Code section 20103.8. City actions which are not purely municipal affairs, however, remain subject to state and/or federal law.

State bidding laws do not apply to the public works projects of a charter city, as long as the projects in question are within the realm of “municipal affairs.” *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994); *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 348 (1981). In general, the mode in which a city chooses to contract is a municipal affair. *Associated Builders and Contractors, Inc. v. San Francisco Airports Commission*, 21 Cal. 4th 352, 364 (1999). Furthermore, the expenditure of charter city funds on a charter city public works contract constitutes a municipal affair. *Domar Electric, Inc.*, 9 Cal 4th at 170-71.

Although the courts have been reluctant to set a strict definition of a municipal affair, certain factors have been consistently interpreted by the courts as taking a contract outside the realm of municipal affairs. In general, any municipal action which substantially affects persons

¹ Although AB 2182 also makes other revisions to the Public Contract Code, those enactments are not applicable to the City and thus are not discussed.

outside of the municipality constitutes a matter of “statewide concern.”² *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 879 (1980). The use of state or federal grants on a project causes that project to constitute a matter of statewide concern rather than a municipal affair, and thus subject to state bidding laws. *Id.* Furthermore, a project performed in coordination with other public entities on a regional basis, such as a transportation facility to be used primarily for travel between cities, does not constitute a municipal affair. *Committee of Seven Thousand v. Superior Court*, 45 Cal. 3d 491, 506 (1988); *Wilson v. City of San Bernardino*, 186 Cal. App. 2d 603 (1960).

Although municipal affair projects are not subject to the particular requirements of section 20103.8, they must still abide by the general rule that the bidding process be undertaken in a manner which avoids favoritism in the selection of the lowest bidder. *Domar Electric, Inc.*, 9 Cal 4th at 173. The City's current alternative bidding practices are premised on this basis. City departments currently use various methods of selecting the lowest bidder on contracts containing alternative bidding, all of which conform to this general rule.

B. Requirements Imposed by Public Contract Code section 20103.8

Under Section 20103.8, when a City contract is not strictly a municipal affair one of four methods must be utilized in determining the lowest bidder on a contract. Public Contract Code section 20103.8 sets forth the permissible methods:

- 1) The lowest bid is determined strictly on the basis of the base bid, without consideration of the prices set forth in the alternates.
- 2) The lowest bid is determined by the total of the base bid and particular alternates specifically identified in the bid documents.
- 3) The lowest bid is determined by the total of the base bid and alternates taken in order of precedence from a specifically identified list of such alternates, depending on available funds as identified in the bid solicitation.
- 4) The lowest bidder is determined by a “blind bid” where the bidders' names are not listed on the bids, and where the City selects the lowest total of base bid and any combination of alternates it chooses after reviewing the anonymous bids.

² As used in this discussion, “statewide” refers to all matters of more than local concern and thus includes matters that are primarily regional rather than truly statewide.

These statutory alternative bidding methods reflect the preexisting general rule against bid favoritism, but also extend that rule by mandating one of the four particular methods of selecting the lowest bidder set forth above.

In addition to requiring the use of one of the four listed methods, Section 20103.8 also requires that the bid solicitation specifically identify in writing which of these four methods will be utilized in determining the lowest bidder. In the absence of such a notification to bidders, only the "base bid" method, described above, may be used.

It is important to note that Section 20103.8 addresses only the selection of the lowest bidder. It does not affect whether a contractor is responsible, nor does it limit which alternates may ultimately be used in a project. Once the City determines the lowest bidder by one of the statutory methods, it is free to include or exclude any or all of the alternates, regardless of their use in determining the lowest bidder.

CONCLUSION

Public Contract Code section 20103.8 will control the alternative bidding procedure on any City contract which is not a "municipal affair." Such contracts typically involve state or federal funding and/or are performed in conjunction with agencies other than the City. When alternative bidding is employed on such contracts, one of the four methods specified in Public Contract Code section 20103.8 must be employed in the selection the lowest bidder, and notice of the use of such method must be contained in the bid documents.

CASEY GWINN, City Attorney

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By

John F. Kirk
Deputy City Attorney

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